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LEGISLATIVE PROTECTION FOR WHISTLEBLOWERS IN BRITAIN

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TABLE OF CONTENTS

INTRODUCTION

DESCRIPTION OF LEGISLATION

CONCLUSION

APPENDIX

LEGISLATIVE PROTECTION FOR WHISTLEBLOWERS IN BRITAIN

INTRODUCTION

The term "whistleblower" is frequently used to describe an employee who discloses wrongdoing within an organization, by either the employer or a fellow employee. After having made a disclosure, the whistleblower may suffer retaliation by being dismissed, demoted or punished in some other way. The main purpose of whistleblower protection legislation is to safeguard employees who blow the whistle against these kinds of employment reprisals. Not only does such legislation encourage whistleblowers to come forward with information on wrongdoing, but it also discourages wrongdoing because of the increased risk of being found out.

In Canada, as in certain other jurisdictions, most notably the United States, a number of statutes, particularly those covering environmental or occupational health and safety matters, protect

whistleblowers who report misdeeds under the statutes. Governments in Canada, however, at both the federal and provincial levels, have thus far generally declined to enact broader whistleblower protection legislation for either public sector or private sector employees.(1) In the United States, legislation at the federal level applies to public sector employees; legislation in many of the States applies primarily to public sector employees but in some cases to private sector employees as well.

Britain is one example of a Commonwealth jurisdiction where, until recently, whistleblowers were in much the same position as in Canada; legislation existed to protect whistleblowers in certain limited situations. However, there was no equivalent to the formal complaint system established in the United States through specialized whistleblowing legislation. An observer once described the situation in Britain as "a combination of restrictive government guidelines and inadequate legal protection [which] conspire to silence any employee from revealing matters of public concern and leave the employer free to punish them."(2) Operating under legal constraints, courts did not generally have the power to protect whistleblowers against employment reprisals. In response to the limited protection available to legitimate whistleblowers, a number of support groups and services, such as Freedom to Care and Public Concern at Work, were established.(3) However, with the coming into force, on 2 July 1999, of the *Public Interest Disclosure Act 1998* (hereinafter referred to as the PIDA 1998), the legal situation regarding whistleblowers in Britain has totally changed; it appears that they may now be among the best protected in the world. Following is a description of the legislation which generally sets out the persons who are protected, with respect to what kinds of disclosures, and in what circumstances.

DESCRIPTION OF LEGISATION

The PIDA 1998 consists of 18 sections, most of which add new sections to, or amend current sections of, Britain's *Employment Rights Act 1996*(4) (hereinafter referred to as the ERA 1996). Subject to limited exceptions, the PIDA 1998 protects workers under contracts of employment (i.e., employees, including Crown servants); those who work personally for someone else (under a "worker's" contract) but who are not genuinely self-employed; homeworkers; certain agency workers; National Health Service (NHS) professionals such as general practitioners, certain dentists, pharmacists and opticians; and certain categories of trainees.(5) Generally, the only workers who are not protected under the legislation are those who are genuinely self-employed, volunteers, police officers, those ordinarily working outside Britain, and those in the armed forces or in the security or intelligence services.(6)

Section 1, the main provision of the PIDA 1998, inserts a new Part IVA entitled *PROTECTED DISCLOSURES* (comprising sections 43A to 43L) into the ERA 1996. Section 43A describes a "protected disclosure" as a "qualifying disclosure" that is made by a worker in accordance with any of sections 43C to 43H. A "qualifying disclosure" as defined in section 43B(1) contains information that, in the reasonable belief of the worker, suggests the occurrence now, in the past, or in the future, of one of the following:

- a criminal offence;
- a failure to comply with a legal obligation;
- a miscarriage of justice;
- a danger to the health or safety of any individual;
- damage to the environment; or
- deliberate concealing of information tending to show any of the preceding five matters.

For the purposes of the above, it is immaterial whether the relevant incident took place in the United Kingdom or elsewhere or whether the law applying to it is the law of the United Kingdom or any other country (section 43B(2)). As well, worker disclosure is not deemed to be a qualifying disclosure if by making it the worker commits an offence; an example would be if the disclosure was prohibited under the *Official Secrets Act 1989* (section 43B(3)). Where the information is protected against disclosure because of legal professional privilege, and the person disclosing it has received the information from someone seeking legal advice, the disclosure is not a qualifying disclosure (section 43B(4)).

In order for a "qualifying disclosure" to constitute a "protected disclosure" certain requirements of sections 43C to 43H of the ERA 1996 must be met; these generally have three aspects:

- what the disclosure is about;
- to whom it is made; and
- the state of mind of the worker who makes it.

According to section 43C of the ERA 1996, a qualifying disclosure is protected provided it is made in good faith to the worker's employer (either directly or in accordance with a procedure authorized by the employer for that purpose) or to another person who the worker reasonably believes to be legally responsible for the relevant failure. There is no other requirement. Presumably, where an employer has an internal, readily accessible procedure that employees are encouraged to use, concerns are more likely to be disclosed first to the employer, rather than to an outside party.

Pursuant to section 43D of the ERA 1996, a qualifying disclosure is deemed protected if it is made in the course of obtaining legal advice. There are no other conditions attached.

A qualifying disclosure is deemed protected if it is made in good faith by a worker to a Minister of the Crown where the worker's employer is an individual appointed under any statute by a Minister of the Crown, or a body whose members are so appointed (section 43E).

Section 43F(1) of the ERA 1996 protects a qualifying disclosure made in good faith by the worker to a person listed in an order made by the Secretary of State for the purposes of the section, where the worker reasonably believes that this is the correct person to receive the allegations and that these allegations are substantially true. The *Public Interest Disclosure (Prescribed Persons) Order 1999*(7) prescribes the appropriate persons and bodies and the matters that can be disclosed to them (section 43F(2)). A copy of the Order is included as an Appendix to this paper. For example, breaches of health and safety regulations can be brought to the attention of the Health and Safety Executive or to the local authority responsible for the enforcement of health and safety legislation, while environmental dangers can be brought to the attention of the Environment Agency.

According to section 43G of the ERA 1996, a qualifying disclosure is a protected disclosure provided that the worker makes it in good faith and without hope of personal gain, and reasonably believes that the information disclosed, and the allegations contained in it, are substantially true. In addition, one or more of the following conditions must be met:

- at the time of making the disclosure, the worker must reasonably believe that he or she would be subjected to reprisal by the employer if disclosure were to be made to the employer or in accordance with section 43F (i.e., to a prescribed person or body);
- where no person or body has been prescribed for the purposes of section 43F in relation to the relevant failure, the worker must reasonably believe that disclosure to the employer would likely result in the destruction or concealment of the information;
- the worker must previously have disclosed substantially the same information to his or her employer or in accordance with section 43F (i.e., to a prescribed person or body).

Finally, in all the circumstances of the case, it must be "reasonable" for the worker to make the disclosure, having regard to:

- the identity of the person to whom the disclosure is made;
- the seriousness of the relevant failure;
- whether the relevant failure is continuing or is likely to occur in the future;
- whether the disclosure breaches the employer's duty of confidentiality to any other person;
- the action that has or might reasonably be expected to have been taken if a disclosure was

made previously to the employer or in accordance with section 43F, to a prescribed person or body; and

- whether, in making the disclosure previously to his or her employer, the worker complied with any internal procedures approved by the employer.

Section 43H of the ERA 1996 stipulates that a qualifying disclosure is a protected disclosure for purposes of the provision if:

- the worker makes the disclosure in good faith;
- he or she reasonably believes that the information disclosed, and any allegations contained in it, are substantially true;
- he or she does not make the disclosure for personal gain;
- the relevant failure is of an exceptionally serious nature (this will be a question of fact in the circumstances of the particular case and not simply a matter of whether the worker believes the case to be exceptionally serious); and
- in light of all the circumstances of the case, it is reasonable for the worker to make the disclosure, having regard, in particular, to the identity of the person to whom it is made.

Any provision in an agreement between a worker and his or her employer that precludes the worker from making a protected disclosure under the Act is void. This includes an agreement to refrain from instituting any proceedings under the *Public Interest Disclosure Act 1998* or any proceedings for breach of contract.(8)

A worker has the right not to be subjected to any detriment by his or her employer for having made a protected disclosure(9) and can file a complaint with an employment tribunal if subjected to a detriment for such reason.(10) A detriment may take a number of forms, such as denial of promotion, facilities or training opportunities that the employer would otherwise have made available. Employees protected by the provisions who are dismissed for making a protected disclosure may make a claim for unfair dismissal. Workers who are not employees may not claim unfair dismissal if their contracts have been terminated because they have made a protected disclosure; however, they can make a complaint that they have been subjected to a detriment.(11)

Where an employment tribunal finds that an employee's complaint of unfair dismissal is justified, it will order re-instatement or re-employment, or the payment of compensation.(12) Where a worker who is not an employee makes a complaint that he or she has been subjected to a detriment and the tribunal finds the complaint to be well-founded, it will make a declaration to that effect and may order the payment of compensation.(13)

CONCLUSION

Prior to the coming into force of the PIDA 1998, whistleblowers in Britain were not generally protected against employment reprisals. Operating under legal constraints, British courts did not have the power to provide such protection. The reason that legislation on the subject was not enacted until now was apparently because of "fears that it would lead to an epidemic of disloyal and aggrieved workers 'ratting' on their bosses about every perceived irregularity."(14) It has been observed that, in fact, the Act encourages workers to raise their concerns first with their employers and that it provides no protection for those workers who fail to act responsibly and reasonably. According to one commentator, "employers can dramatically reduce the risk that there will be an embarrassing public disclosure by implementing effective whistleblowing policies, thereby demonstrating to their workers a clear commitment to eradicate malpractice in the workplace."(15)

Since the legislation has been in force for only a short period of time, it is too early to know the types of problems that might arise under the Act or what developments in case law could affect the rights of whistleblowers under the legislation. In any event, the Act appears to provide much needed legal protection for whistleblowers in Britain by ensuring that problems are brought to the attention of the appropriate person while at the same time encouraging whistleblowers themselves to act responsibly.

APPENDIX

STATUTORY INSTRUMENTS

1999 No. 1549

TERMS AND CONDITIONS OF EMPLOYMENT

The Public Interest Disclosure (Prescribed Persons) Order 1999

Made - - - -	*5th June 1999*
Laid before Parliament	*8th June 1999*
Coming into force	*2nd July 1999*

The Secretary of State, in exercise of the powers conferred on him by section 43F of the Employment Rights Act 1996(a), hereby makes the following Order:-

Citation and commencement

1. This Order may be cited as the Public Interest Disclosure (Prescribed Persons) Order 1999 and shall come into force on 2nd July 1999.

Prescribed Persons

2.—(1) The persons and descriptions of persons prescribed for the purposes of section 43F of the Employment Rights Act 1996 are the persons and descriptions of persons specified in the first column of the Schedule.

(2) The descriptions of matters in respect of which each person, or persons of each description, specified in the first column of the Schedule is or are prescribed are the descriptions of matters respectively specified opposite them in the second column of the Schedule.

Ian McCartney
Minister of State,
Department of Trade and Industry

5th June 1999

SCHEDULE Article 2

FIRST COLUMN *Persons and descriptions of persons*	*SECOND COLUMN* *Description of matters*
Accounts Commission for Scotland and auditors appointed by the Commission to audit the accounts of local government, and health service, bodies.	The proper conduct of public business, value for money, fraud and corruption in local government, and health service, bodies.
Audit Commission for England and Wales and auditors appointed by the Commission to audit the accounts of local government, and health service, bodies.	The proper conduct of public business, value for money, fraud and corruption in local government, and health service, bodies.
Building Societies Commission.	The operation of building societies.
Certification Officer.	Fraud, and other irregularities, relating to the financial affairs of trade unions and employers' associations.
Charity Commissioners for England and Wales.	The proper administration of charities and of funds given or held for charitable purposes.
Lord Advocate, Scotland.	The proper administration of charities and of funds given or held for charitable purposes. Serious or complex fraud.
Chief Executive of the Criminal Cases Review Commission.	Actual or potential miscarriages of justice.
Chief Executive of the Scottish Criminal Cases Review Commission.	Actual or potential miscarriages of justice.
Chief Registrar of Friendly Societies.	The operation of credit unions, clubs, housing associations, co-operatives and other industrial and provident societies, benevolent societies, working men's clubs and specially authorised societies.
Assistant Registrar of Friendly Societies for Scotland.	The operation of clubs, housing associations, co-operatives and other industrial and provident societies, benevolent societies, working men's clubs and specially authorised societies.
Civil Aviation Authority.	Compliance with the requirements of civil aviation legislation, including aviation safety.

The competent authority under Part IV of the Financial Services Act 1986(a).	The listing of securities on a stock exchange, prospectuses on offers of transferable securities to the public.
Commissioners of Customs and Excise.	Value added tax, insurance premium tax, excise duties and landfill tax. The import and export of prohibited or restricted goods.
Commissioners of the Inland Revenue.	Income tax, corporation tax, capital gains tax, petroleum revenue tax, inheritance tax, stamp duties, national insurance contributions, statutory maternity pay and statutory sick pay.
Comptroller and Auditor General of the National Audit Office.	The proper conduct of public business, value for money, fraud and corruption in relation to the provision of centrally-funded public services.
Auditor General for Wales.	The proper conduct of public business, value for money, fraud and corruption in relation to the provision of public services.
Data Protection Registrar.	Compliance with the requirements of legislation relating to data protection.

(a) 1986 c. 60.

FIRST COLUMN *Persons and descriptions of persons*	*SECOND COLUMN* *Descriptions of matters*
Director General of Electricity Supply.	The generation, transmission, distribution and supply of electricity, and activities ancillary to these matters.
Director General of Fair Trading.	Matters concerning the sale of goods or the supply of services which adversely affect the interests of consumers. Matters relating to consumer credit and hire, estate agency, unfair terms in consumer contracts and misleading advertising. The abuse of a dominant position in a market and the prevention, restriction or distortion of competition.
Director General of Gas Supply.	The transportation, shipping and supply of gas through pipes, and activities ancillary to these matters.
Director General of Telecommunications.	The provision and use of telecommunication systems, services and apparatus.
Director General of Water Services.	The supply of water and the provision of sewerage services.
Director of the Serious Fraud Office.	Serious or complex fraud.
Environment Agency.	Acts or omissions which have an actual or potential effect on the environment or the management or regulation of the environment, including those relating to pollution, abstraction of water, flooding, the flow in rivers, inland fisheries and migratory salmon or trout.
Scottish Environment Protection Agency.	Acts or omissions which have an actual or potential effect on the environment or the management or regulation of the environment, including those relating to flood warning systems and pollution.
Financial Services Authority.	The carrying on of investment business or of insurance business; the operation of banks, deposit-taking businesses and wholesale

	deposit-taking businesses and wholesale money market regimes; the functioning of financial markets, investment exchanges and clearing houses; the functioning of other financial regulators; money laundering, financial crime, and other serious financial misconduct, in connection with activities regulated by the Financial Services Authority.
Friendly Societies Commission.	The operation of friendly societies and industrial assurance companies.
Health and Safety Executive.	Matters which may affect the health or safety of any individual at work; matters, which may affect the health or safety of any member of the public, arising out of or in connection with the activities of persons at work.
Local authorities which are responsible for the enforcement of health and safety legislation.	Matters which may affect the health or safety of any individual at work; matters, which may affect the health or safety of any member of the public, arising out of or in connection with the activities of persons at work.

3

FIRST COLUMN	*SECOND COLUMN*
Persons and descriptions of persons	*Descriptions of matters*
Investment Management Regulatory Organisation.	The activities of persons regulated by the Investment Management Regulatory Organisation.
Occupational Pensions Regulatory Authority.	Matters relating to occupational pension schemes and other private pension arrangements.
Personal Investment Authority.	The activities of persons regulated by the Personal Investment Authority.
Rail Regulator.	The provision and supply of railway services.
Securities and Futures Authority.	The activities of persons regulated by the Securities and Futures Authority.
Treasury.	The carrying on of insurance business.
Secretary of State for Trade and Industry.	Fraud, and other misconduct, in relation to companies, investment business, insurance business, or multi-level marketing schemes (and similar trading schemes); insider dealing. Consumer safety.
Local authorities which are responsible for the enforcement of consumer protection legislation.	Compliance with the requirements of consumer protection legislation.
A person ("person A") carrying out functions, by virtue of legislation, relating to relevant failures falling within one or more matters within a description of matters in respect of which another person ("person B") is prescribed by this Order, where person B was previously responsible for carrying out the same or substantially similar functions and has ceased to be so responsible.	Matters falling within the description of matters in respect of which person B is prescribed by this Order, to the extent that those matters relate to functions currently carried out by person A.

(1) The writer is aware of only one Canadian jurisdiction where specific legislation on the subject is in force; see section 28 of New Brunswick's *Employment Standards Act*, which applies to both public and private sector employees. In December 1993, Ontario enacted specific legislation on the subject to protect public sector employees (Part IV of Ontario's *Public Service Act*) but this has never been proclaimed in force.

(2) J. Cooper and D. Green, "Whistleblowers," *Solicitors Journal*, 20 November 1992, p. 1166.

(3) As described in: Australia, Senate Select Committee on Public Interest Whistleblowing, *In the Public Interest*, 1994, p. 21-4.

(4) 1996 chapter 18: http://www.legislation.hmso.gov.uk/acts/acts1996/1996018.htm.

(5) For a definition of a "worker" for purposes of Part IVA of the ERA 1996, see section 1 of the PIDA 1998 adding, among other new sections, section 43K to the ERA 1996; also see section 10 of the PIDA 1998 amending section 191 of the ERA 1996 (Crown employment).

(6) See generally, section 11 of the PIDA 1998 amending section 193 of the ERA 1996; section 12 of the PIDA 1998 amending section 196 of the ERA 1996; and section 13 of the PIDA 1998 amending section 200 of the ERA 1996.

(7) Britain, Statutory Instruments 1999 No. 1549.

(8) Section 1 of the PIDA 1998 adding section 43J to the ERA 1996.

(9) Section 2 of the PIDA 1998 adding section 47B to the ERA 1996.

(10) Section 3 of the PIDA 1998 amending section 48 of the ERA 1996.

(11) *Guide to the Public Interest Disclosure Act 1998.*

(12) *Ibid*; see also section 8 of the PIDA 1998 amending sections 112, 117, 118 and adding section 127B to ERA 1996. Calculation of the amount of compensation for employees dismissed for making a protected disclosure is done as prescribed by regulation.

(13) *Ibid.*, see also section 4 of the PIDA 1998 amending section 49 of the ERA 1996 and placing a limit on the amount of compensation available in such a case.

(14) C. Camp, "Openness and Accountability in the Workplace," *New Law Journal*, Vol. 149, January 1999, p. 46 at p. 50.

(15) *Ibid.*

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PROTECTION LÉGISLATIVE DES DÉNONCIATEURS EN GRANDE-BRETAGNE

Rédaction :
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Division du droit et du gouvernement
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TABLE DES MATIÈRES

INTRODUCTION

DESCRIPTION DES MESURES LÉGISLATIVES

CONCLUSION

ANNEXE

PROTECTION LÉGISLATIVE DES DÉNONCIATEURS EN GRANDE-BRETAGNE

INTRODUCTION

Le terme « dénonciateur » est fréquemment utilisé pour désigner un employé qui révèle l'existence d'abus de la part de l'employeur ou d'un collègue au sein d'une organisation. À la suite d'une telle divulgation, le dénonciateur peut faire l'objet de mesures de représailles, c'est-à-dire être congédié, rétrogradé ou pénalisé de quelque autre façon. Le principal objectif d'une loi visant à protéger les dénonciateurs consiste à mettre les employés à l'abri de ce genre de représailles. Non seulement une telle loi encourage-t-elle les dénonciateurs à divulguer l'information dont ils disposent au sujet d'un abus, mais elle a aussi un effet dissuasif en raison du risque accru d'être découvert.

Au Canada, comme dans d'autres pays et plus particulièrement aux États-Unis, un certain nombre de

lois, surtout celles traitant de questions environnementales ou de sécurité et de santé au travail, protègent les dénonciateurs qui signalent l'existence de méfaits conformément aux lois existantes. Nos gouvernements, tant à l'échelon fédéral que provincial, ont toutefois refusé jusqu'à maintenant de promulguer une loi plus exhaustive visant à protéger les dénonciateurs dans les secteurs public et privé (1). Aux États-Unis, la législation fédérale s'applique aux employés de la fonction publique fédérale; dans bien des États, elle vise principalement les employés du secteur public mais, dans certains cas, ceux du secteur privé également.

La Grande-Bretagne est l'un des pays du Commonwealth où, jusqu'à récemment, les dénonciateurs étaient à peu près dans la même situation que ceux au Canada, c'est-à-dire qu'ils ne bénéficiaient d'une certaine protection législative que dans certaines situations précises. Il n'existait toutefois aucun système équivalent à la procédure officielle de traitement des plaintes établie aux États-Unis depuis l'adoption de mesures législatives spéciales pour protéger les dénonciateurs. Un observateur a déjà décrit la situation en Grande-Bretagne comme « un mélange de lignes directrices gouvernementales restrictives et de mesures de protection juridique inadéquates, [qui] ont pour effet de réduire au silence les employés qui seraient tentés de divulguer des renseignements d'intérêt public et de laisser l'employeur libre de punir les dénonciateurs(2). Parce qu'ils doivent se plier à certaines contraintes juridiques, les tribunaux n'ont généralement pas le pouvoir de protéger les dénonciateurs contre les mesures de représailles prises par leurs employeurs. Devant le peu de protection offerte aux dénonciateurs légitimes, un certain nombre de groupes et de services de soutien, tels que le Freedom to Care et le Public Concern at Work, se sont constitués(3). Toutefois, avec l'entrée en vigueur, le 2 juillet 1999, de la *Public Interest Disclosure Act 1998* (ci-après désignée sous le nom de PIDA 1998), la situation juridique des dénonciateurs en Grande-Bretagne a changé du tout au tout; il semble qu'ils sont peut-être maintenant parmi les mieux protégés au monde. Voici une description des mesures législatives adoptées. Elles précisent de façon générale qui sont les personnes visées par la protection offerte, à l'égard de quel genre de divulgations elles le sont et dans quelles circonstances.

DESCRIPTION DES MESURES LÉGISLATIVES

La PIDA 1998 renferme 18 articles qui, pour la plupart, ajoutent de nouvelles dispositions à la *Employment Rights Act 1996* de la Grande-Bretagne(4) (ci-après désignée sous le nom de ERA 1996) ou modifient celles existantes. Sous réserve de certaines restrictions limitées, la PIDA 1998 protège les personnes liées par un contrat de travail (p. ex., les employés, notamment les fonctionnaires de la Couronne); celles qui travaillent personnellement pour quelqu'un d'autre (en vertu d'un contrat « de travail ») mais qui ne sont pas véritablement à leur compte; les personnes travaillant à domicile; certains employés d'agences; les professionnels à l'emploi du National Health Service (NHS), tels que les omnipraticiens, certains dentistes, les pharmaciens et les opticiens; certaines catégories de stagiaires (5). De façon générale, les seules personnes qui ne sont pas protégées en vertu de ces mesures législatives sont celles qui sont véritablement à leur compte, les bénévoles, les agents de police, celles qui travaillent habituellement à l'extérieur de la Grande-Bretagne et celles qui font partie des forces armées ou des services de sécurité ou de renseignement(6).

L'article 1, qui constitue la principale disposition de la PIDA 1998, ajoute une nouvelle partie IVA intitulée *PROTECTED DISCLOSURES* (qui comprend les articles 43A à 43L) à la ERA 1996. L'article 43A définit la « divulgation protégée » comme une « divulgation admissible » qui est faite par un employé conformément à l'un ou l'autre des articles 43C à 43H. Une « divulgation admissible », au sens du paragraphe 43B(1), renferme des renseignements qui tendent à prouver, selon la conviction raisonnable qu'en a le divulgateur, que l'une ou l'autre des situations suivantes se produit, s'est produite ou se produira :

- un acte criminel;
- un manquement à une obligation juridique;
- une erreur judiciaire;
- un danger pour la santé ou la sécurité d'une personne;
- un dommage à l'environnement;
- une dissimulation délibérée de renseignements tendant à démontrer l'existence de l'une ou l'autre des cinq situations susmentionnées.

Aux fins de la disposition ci-dessus, il importe peu de savoir si l'incident en question s'est produit au

Royaume-Uni ou ailleurs ou si la loi applicable en la matière est celle du Royaume-Uni ou d'un autre pays (paragraphe 43B(2)). De même, une divulgation n'est pas réputée être une divulgation admissible si, en la faisant, son auteur commet une infraction; ce serait le cas, par exemple, si la divulgation est interdite en vertu de la *Official Secrets Act 1989* (paragraphe 43B(3)). Si l'information ne peut être divulguée parce qu'elle est protégée par le secret professionnel de l'avocat et que la personne qui la divulgue la tient de quelqu'un qui sollicitait un avis juridique, la divulgation n'est pas considérée comme étant admissible (paragraphe 43B(4)).

Pour qu'une « divulgation admissible » soit une « divulgation protégée », il faut que certaines exigences énoncées aux articles 43C à 43H de la ERA 1996 soient satisfaites; celles-ci portent généralement sur trois aspects :

- l'objet de la divulgation;
- la personne à qui elle est faite;
- l'état d'esprit de l'employé qui la fait.

Selon l'article 43C de la ERA 1996, une divulgation admissible est protégée si elle est faite de bonne foi à l'employeur (soit directement ou suivant une procédure autorisée par l'employeur à cette fin) ou à une autre personne que l'employé croit raisonnablement être la personne responsable du manquement en question vis-à-vis de la loi. C'est la seule exigence applicable. On peut présumer que lorsqu'il y a en place une procédure interne facilement accessible que les employés sont encouragés à utiliser, la divulgation des préoccupations a plus de chance de se faire en premier lieu à l'employeur plutôt qu'à une tierce partie.

Conformément à l'article 43D de la ERA 1996, une divulgation admissible est réputée protégée si elle est faite dans le cadre d'une démarche visant à obtenir un avis juridique. Il n'y a pas d'autres conditions applicables.

Une divulgation admissible est réputée protégée, si elle est faite de bonne foi à un ministre de la Couronne, lorsque l'employeur concerné est une personne nommée en vertu d'une loi par un ministre de la Couronne, ou un organisme dont les membres sont eux aussi nommés de cette façon (article 43E).

Le paragraphe 43F(1) de la ERA 1996 protège une divulgation admissible faite de bonne foi à une personne dont le nom figure dans une ordonnance rendue par le secrétaire d'État aux fins de l'application de cette disposition, lorsque son auteur croit raisonnablement qu'il s'agit de la bonne personne pour recevoir les allégations et que celles-ci sont en grande partie vraies. Le *Public Interest Disclosure (Prescribed Persons) Order 1999*(7) désigne les personnes et les organismes habilités à cet égard et précise les questions pouvant leur être divulguées (paragraphe 43F(2)). Une copie de l'ordonnance en question est jointe en annexe au présent document. Par exemple, les dérogations à la réglementation en matière de santé et de sécurité peuvent être portées à l'attention d'un cadre responsable des questions de santé et de sécurité ou de l'autorité locale responsable de l'application des mesures législatives en vigueur à ce sujet, tandis que les dangers pour l'environnement peuvent être portés à l'attention de l'agence de l'environnement.

Conformément à l'article 43G de la ERA 1996, une divulgation admissible est protégée si elle est faite de bonne foi sans que son auteur espère en tirer un gain personnel, et si celui-ci croit raisonnablement que l'information divulguée et les allégations qu'elle renferme sont en grande partie vraies. Une ou plusieurs des conditions suivantes doivent en outre être respectées :

- au moment de faire la divulgation, son auteur doit être raisonnablement convaincu qu'il s'expose à des représailles de la part de son employeur, si la divulgation doit être faite à l'employeur en question ou en conformité avec l'article 43F (c.-à-d., à une personne ou à un organisme désigné);
- lorsqu'aucune personne ou aucun organisme n'a été désigné aux fins de l'article 43F en rapport avec l'omission à signaler, l'auteur de la divulgation doit être raisonnablement convaincu que la divulgation à l'employeur de l'information en question risque d'entraîner sa destruction ou sa dissimulation;
- l'auteur de la divulgation doit auparavant avoir divulgué une bonne partie de cette même information à son employeur ou en conformité avec l'article 43F (c.-à-d., à une personne ou à

un organisme désigné).

Enfin, dans toutes les circonstances de fait, il doit sembler « raisonnable » à l'employé de faire la divulgation, compte tenu des aspects suivants :

- l'identité de la personne à qui la divulgation est faite;
- la gravité du manquement en question;
- la possibilité que le manquement en question se perpétue ou se produise de nouveau dans l'avenir;
- la possibilité que la divulgation porte atteinte à l'obligation de confidentialité de l'employeur envers une autre personne;
- les mesures qui ont été prises ou auraient pu raisonnablement l'être, lorsqu'une divulgation a été faite antérieurement à l'employeur ou, en conformité avec l'article 43F, à une personne ou à un organisme désigné;
- si, au moment de la divulgation antérieure, la procédure interne approuvée par l'employeur a été respectée.

L'article 43H de la ERA 1996 stipule qu'une divulgation admissible est protégée aux fins de la disposition en question si :

- son auteur la fait de bonne foi;
- son auteur est raisonnablement convaincu que l'information divulguée et les allégations qu'elle renferme sont en grande partie vraies;
- l'auteur de la divulgation n'espère pas en tirer un avantage personnel;
- le manquement en question revêt un caractère exceptionnellement grave (il importe de préciser ici que le degré de gravité sera déterminé en fonction des faits se rapportant au cas particulier et ne sera pas laissé au simple jugement de l'employé);
- à la lumière de toutes les circonstances de fait, il semble raisonnable à l'employé de faire la divulgation, compte tenu en particulier de l'identité de la personne à qui elle est faite.

Toute disposition d'une entente entre un employé et son employeur, qui a pour effet d'empêcher l'employé de faire une divulgation protégée en vertu de la Loi est frappée de nullité. C'est le cas, par exemple, d'une entente visant à empêcher l'engagement de poursuites en vertu de la *Public Interest Disclosure Act 1998* ou de toute autre procédure pour rupture de contrat(8).

Un employé a le droit de ne pas être pénalisé par son employeur lorsqu'il fait une divulgation protégée (9), et il peut déposer une plainte auprès d'un tribunal du travail s'il subit un préjudice pour cette raison(10). Un préjudice peut prendre plusieurs formes, par exemple un refus d'accorder une promotion, de fournir des installations ou d'offrir des possibilités de formation qui en d'autres circonstances l'auraient été. Les employés visés par les dispositions qui sont congédiés pour avoir fait une divulgation protégée peuvent déposer une plainte pour congédiement injustifié. Ceux qui ne sont pas des employés ne peuvent déposer de plainte pour congédiement injustifié, lorsque leur contrat est résilié parce qu'ils ont fait une divulgation protégée; toutefois, ils peuvent déposer une plainte s'ils ont subi un préjudice(11).

Lorsqu'un tribunal du travail juge que la plainte d'un employé pour congédiement injustifié est recevable, il ordonnera sa réintégration ou son réembauchage, ou obligera son employeur à lui verser une indemnité(12). Lorsque quelqu'un qui n'est pas un employé dépose une plainte parce qu'il a été victime d'un préjudice et que le tribunal juge que sa plainte est fondée, il fera une déclaration à cet effet et pourra ordonner le versement d'une indemnité(13).

CONCLUSION

Avant l'entrée en vigueur de la PIDA 1998, les dénonciateurs en Grande-Bretagne n'étaient généralement pas protégés contre les mesures de représailles prises par leur employeur. À cause des contraintes juridiques auxquelles ils sont assujettis, les tribunaux britanniques n'avaient pas le pouvoir d'offrir cette protection. Si l'adoption de mesures législatives à ce sujet a tant tardé, c'est apparemment parce qu'« on craignait que cela n'entraîne une épidémie de dénonciations de la part d'employés lésés

et déloyaux qui ont toujours quelque chose à reprocher à leur patron pour la moindre irrégularité perçue »(14). Il a été constaté, en fait, que la Loi incitait les employés à d'abord faire part de leurs préoccupations à leurs employeurs, et que les dispositions n'offraient aucune protection aux employés qui agissent de façon irresponsable et déraisonnable. Selon un observateur, « les employeurs peuvent réduire radicalement le risque d'une divulgation publique embarrassante en adoptant des politiques efficaces en matière de dénonciation, pour ainsi démontrer à leurs employés le sérieux de leur engagement à mettre fin à l'incurie au travail »(15).

Comme la Loi n'est en vigueur que depuis peu, il est trop tôt pour savoir le genre de problèmes auxquels elle est susceptible de donner lieu ou ce qu'il adviendra si jamais une loi modifie les droits qu'elle reconnaît aux dénonciateurs. Quoi qu'il en soit, la Loi semble offrir aux dénonciateurs en Grande-Bretagne la protection qui jusqu'ici leur faisait cruellement défaut. En plus de faire en sorte que les problèmes soient portés à l'attention de la personne compétente, son application a pour effet d'inciter les dénonciateurs eux-mêmes à agir de façon responsable.

ANNEXE

STATUTORY INSTRUMENTS

1999 No. 1549

TERMS AND CONDITIONS OF EMPLOYMENT

The Public Interest Disclosure (Prescribed Persons) Order 1999

Made - - - -	*5th June 1999*
Laid before Parliament	*8th June 1999*
Coming into force	*2nd July 1999*

The Secretary of State, in exercise of the powers conferred on him by section 43F of the Employment Rights Act 1996(a), hereby makes the following Order:–

Citation and commencement

1. This Order may be cited as the Public Interest Disclosure (Prescribed Persons) Order 1999 and shall come into force on 2nd July 1999.

Prescribed Persons

2.—(1) The persons and descriptions of persons prescribed for the purposes of section 43F of the Employment Rights Act 1996 are the persons and descriptions of persons specified in the first column of the Schedule.

(2) The descriptions of matters in respect of which each person, or persons of each description, specified in the first column of the Schedule is or are prescribed are the descriptions of matters respectively specified opposite them in the second column of the Schedule.

Ian McCartney
Minister of State,
Department of Trade and Industry

5th June 1999

(a) 1996 c. 18. Section 43F of the Employment Rights Act 1996 was inserted by the Public Interest Disclosure Act 1998 (c. 23), section 1.

SCHEDULE Article 2

FIRST COLUMN *Persons and descriptions of persons*	*SECOND COLUMN* *Descriptions of matters*
Accounts Commission for Scotland and auditors appointed by the Commission to audit the accounts of local government, and health service, bodies.	The proper conduct of public business, value for money, fraud and corruption in local government, and health service, bodies.
Audit Commission for England and Wales and auditors appointed by the Commission to audit the accounts of local government, and health service, bodies.	The proper conduct of public business, value for money, fraud and corruption in local government, and health service, bodies.
Building Societies Commission.	The operation of building societies.
Certification Officer.	Fraud, and other irregularities, relating to the financial affairs of trade unions and employers' associations.
Charity Commissioners for England and Wales	The proper administration of charities and of funds given or held for charitable purposes.
Lord Advocate, Scotland.	The proper administration of charities and of funds given or held for charitable purposes Serious or complex fraud.
Chief Executive of the Criminal Cases Review Commission.	Actual or potential miscarriages of justice.
Chief Executive of the Scottish Criminal Cases Review Commission.	Actual or potential miscarriages of justice
Chief Registrar of Friendly Societies.	The operation of credit unions, clubs, housing associations, co-operatives and other industrial and provident societies, benevolent societies, working men's clubs and specially authorised societies.
Assistant Registrar of Friendly Societies for Scotland.	The operation of clubs, housing associations, co-operatives and other industrial and provident societies, benevolent societies, working men's clubs and specially authorised societies.
Civil Aviation Authority.	Compliance with the requirements of civil aviation legislation, including aviation safety.
The competent authority under Part IV of the Financial Services Act 1986(a).	The listing of securities on a stock exchange, prospectuses on offers of transferable securities to the public
Commissioners of Customs and Excise.	Value added tax, insurance premium tax, excise duties and landfill tax. The import and export of prohibited or restricted goods.

Commissioners of the Inland Revenue	Income tax, corporation tax, capital gains tax, petroleum revenue tax, inheritance tax, stamp duties, national insurance contributions, statutory maternity pay and statutory sick pay.
Comptroller and Auditor General of the National Audit Office.	The proper conduct of public business, value for money, fraud and corruption in relation to the provision of centrally-funded public services.
Auditor General for Wales.	The proper conduct of public business, value for money, fraud and corruption in relation to the provision of public services.
Data Protection Registrar.	Compliance with the requirements of legislation relating to data protection.

(a) 1998 c. 44.

FIRST COLUMN *Persons and descriptions of persons*	*SECOND COLUMN* *Descriptions of matters*
Director General of Electricity Supply.	The generation, transmission, distribution and supply of electricity, and activities ancillary to these matters.
Director General of Fair Trading.	Matters concerning the sale of goods or the supply of services which adversely affect the interests of consumers. Matters relating to consumer credit and hire, estate agency, unfair terms in consumer contracts and misleading advertising. The abuse of a dominant position in a market and the prevention, restriction or distortion of competition.
Director General of Gas Supply.	The transportation, shipping and supply of gas through pipes, and activities ancillary to these matters.
Director General of Telecommunications.	The provision and use of telecommunication systems, services and apparatus.
Director General of Water Services.	The supply of water and the provision of sewerage services.
Director of the Serious Fraud Office.	Serious or complex fraud.
Environment Agency.	Acts or omissions which have an actual or potential effect on the environment or the management or regulation of the environment, including those relating to pollution, abstraction of water, flooding, the flow in rivers, inland fisheries and migratory salmon or trout.
Scottish Environment Protection Agency.	Acts or omissions which have an actual or potential effect on the environment or the management or regulation of the environment, including those relating to flood warning systems and pollution.
Financial Services Authority.	The carrying on of investment business or of insurance business; the operation of banks, deposit-taking businesses and wholesale money market regimes; the functioning of financial markets, investment exchanges and clearing houses; the functioning of other financial regulators; money laundering, financial crime, and other serious financial misconduct, in connection with activities regulated by the Financial Services Authority.

Friendly Societies Commission.	The operation of friendly societies and industrial assurance companies.
Health and Safety Executive.	Matters which may affect the health or safety of any individual at work; matters, which may affect the health or safety of any member of the public, arising out of or in connection with the activities of persons at work.
Local authorities which are responsible for the enforcement of health and safety legislation.	Matters which may affect the health or safety of any individual at work; matters, which may affect the health or safety of any member of the public, arising out of or in connection with the activities of persons at work.

3

FIRST COLUMN	*SECOND COLUMN*
Persons and descriptions of persons	*Descriptions of matters*
Investment Management Regulatory Organisation.	The activities of persons regulated by the Investment Management Regulatory Organisation.
Occupational Pensions Regulatory Authority.	Matters relating to occupational pension schemes and other private pension arrangements.
Personal Investment Authority.	The activities of persons regulated by the Personal Investment Authority.
Rail Regulator.	The provision and supply of railway services.
Securities and Futures Authority.	The activities of persons regulated by the Securities and Futures Authority.
Treasury.	The carrying on of insurance business.
Secretary of State for Trade and Industry.	Fraud, and other misconduct, in relation to companies, investment business, insurance business, or multi-level marketing schemes (and similar trading schemes); insider dealing. Consumer safety.
Local authorities which are responsible for the enforcement of consumer protection legislation.	Compliance with the requirements of consumer protection legislation.
A person ("person A") carrying out functions, by virtue of legislation, relating to relevant failures falling within one or more matters within a description of matters in respect of which another person ("person B") is prescribed by this Order, where person B was previously responsible for carrying out the same or substantially similar functions and has ceased to be so responsible.	Matters falling within the description of matters in respect of which person B is prescribed by this Order, to the extent that those matters relate to functions currently carried out by person A.

(1) À la connaissance de l'auteur, il n'existe qu'une seule province au Canada où une loi précise sur le sujet est en vigueur; voir l'article 28 de la *Loi sur les normes d'emploi* du Nouveau-Brunswick, qui

s'applique aux employés des secteurs public et privé. En décembre 1993, l'Ontario a adopté une loi afin de protéger expressément les employés du secteur public (partie IV de la *Loi sur la fonction publique* de l'Ontario), mais celle-ci n'est jamais entrée en vigueur.

(2) J. Cooper et D. Green, « Whistleblowers », *Solicitors Journal*, 20 novembre 1992, p. 1166.

(3) Voir la description dans : Australie, Senate Select Committee on Public Interest Whistleblowing, *In the Public Interest*, 1994, p. 21-4.

(4) 1996, chapitre 18 http://www.legislation.hmso.gov.uk/acts/acts1996/1996018.htm.

(5) Pour une définition du terme « worker » au sens de la partie IVA de la ERA 1996, voir l'article 1 de la PIDA 1998 qui ajoute, entre autres nouvelles dispositions, un article 43K à la ERA 1996; voir aussi l'article 10 de la PIDA 1998 qui modifie l'article 191 de la ERA 1996 (emploi dans la fonction publique).

(6) Voir de façon générale, l'article 11 de la PIDA 1998 qui modifie l'article 193 de la ERA 1996; l'article 12 de la PIDA 1998 qui modifie l'article 196 de la ERA 1996 et l'article 13 de la PIDA 1998 qui modifie l'article 200 de la ERA 1996.

(7) Grande-Bretagne, Statutory Instuments 1999, n 1549.

(8) Article 1 de la PIDA 1998 qui ajoute un article 43G à la ERA 1996.

(9) Article 2de la PIDA 1998 qui ajoute un article 47B à la ERA 1996.

(10) Article 3 de la PIDA 1998 qui ajoute un article 48 à la ERA 1996.

(11) *Guide to the Public Interest Disclosure Act 1998.*

(12) *Ibid.*, voir aussi l'article 8 de la PIDA 1998 qui modifie les articles 112, 117, 118 et qui ajoute un article 127B à la ERA 1996. Le calcul du montant de l'indemnité versée aux employés congédiés pour avoir fait une divulgation protégée se fait conformément aux dispositions prévues par règlement.

(13) *Ibid.*, voir aussi l'article 4 de la PIDA 1998 qui modifie l'article 49 de la ERA 1996 et impose une limite à l'égard du montant de l'indemnité pouvant être versée dans un cas semblable.

(14) C. Camp, « Openness and Accountability in the Workplace », *New Law Journal*, vol. 149, janvier 1999, p. 46 à 50.

(15) *Ibid.*